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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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RIO TINTO,

Plaintiff,

v.

14 CV 3042 (RMB)

VALE, S.A., et al.,

Defendants.

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New York, N.Y.
October 27, 2015
10:38 a.m.

Before:

HON. RICHARD M. BERMAN,

District Judge

APPEARANCES

QUINN EMMANUEL URQUHART & SULLIVAN, LLP

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1 THE COURT: I thought notwithstanding that the motion
2 is defendants' motion that I might start with plaintiff because
3 I'm going to refer to the complaint in some respects, so maybe
4 do that early on and then we'll hear from the defense after you
5 all. Is that okay? Great.

6 So I have a preliminary question for everybody, I
7 guess, but I'll ask the plaintiffs first. There are two
8 letters that come up obviously throughout the complaint and the
9 motion papers and they are those from the Guinean government,
10 one I think dated on or about December 8, 2008, and the other
11 dated on or about June 29, 2009. And I don't know if you
12 intended to or did -- I didn't see them as part of the record
13 of this motion, and I'd like to know what your feeling is if it
14 belongs in the motion. It seems to be integral. The bottom
15 line is if all that is true, I don't have copies of them. If
16 you do, I would appreciate that.

17 MR. LYLE: Your Honor, Michael Lyle for plaintiff Rio
18 Tinto. We'd be happy to provide both of those letters to your
19 Honor. We can have them sent over later this afternoon.

20 THE COURT: Okay. That would be great. Do you agree
21 that they're really part and parcel of the motion?

22 MR. LYLE: Yes. We've alleged them in the complaint,
23 and I do believe that they do come up as part of the motion.

24 THE COURT: Defense, is that agreeable to you as well?

25 MR. LIMAN: Yes, your Honor.

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1 THE COURT: Okay. So I'm happy to start with the
2 plaintiff. I have a couple of questions. You may have some
3 points you want to make independently. Why don't you do that
4 first and then I'll pose some questions I might have.

5 MR. LYLE: Certainly, your Honor.

6 THE COURT: You're welcome to use the podium if you
7 like.

8 MR. LYLE: If the Court doesn't mind, I'm set up here.

9 THE COURT: That's great. Sure.

10 MR. LYLE: As long as you can hear me okay.

11 THE COURT: I can. No problem.

12 MR. LYLE: With respect to the motion to dismiss, it's
13 clear that there are three main areas where the defendants have
14 filed their motion to dismiss -- one having to do with statute
15 of limitations; the other with the 12(b)(6) merits pleading the
16 RICO violations; and, lastly, the personal jurisdiction issues
17 which are raised only by some of the defendants, particularly
18 BSGR and Steinmetz.

19 Your Honor, with respect to the statute of limitations
20 aspects of the motion to dismiss, they're without merit. Under
21 whatever analysis as applicable to the facts, I would want to
22 highlight to the Court a decision that we cited in our
23 opposition papers, that's the decision by Judge Preska in the
24 *Forde* case, the *New York District Council of Carpenters Pension*
25 *Fund v. Forde* case, 939 F.Supp.2d 268. We did cite it in our

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1 case. We didn't spend a great deal of time discussing it given
2 the space limitations and the number of arguments we had. We
3 think this one is worthwhile to highlight to the Court as it
4 tracks the allegations in our complaint as it relates to
5 fraudulent concealment and as it relates to the RICO
6 allegations, particularly with respect to the requirements of
7 pleading a conspiracy under 1962(d).

8 And in this case, the motion to dismiss, as we
9 understand the statute of limitations arguments, they are
10 arguing that the injury that is the RICO injury occurred in
11 December of 2008.

12 THE COURT: Right.

13 MR. LYLE: That is not a RICO injury.

14 THE COURT: It's not one generically or it's not one
15 that you're asserting?

16 MR. LYLE: It's not one generically and it's not one
17 we're asserting, because there were no predicate acts committed
18 prior to that in December of 2008. And that's the
19 correspondence that your Honor just asked about and it's the
20 allegations in the complaint relating to the purported action
21 by the government of Guinea to reduce Rio Tinto's rights to
22 blocks 1 and 2 and purportedly to convey those to defendant
23 BSGR as it relates to Simandou and, ultimately, to Vale and
24 their coconspirator Vale and VBG, which became the entity
25 through which BSGR and Vale acted.

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1 The 2008 action is not the result of any predicate
2 acts. The predicate acts that we allege and that form the
3 basis of the injury occurred beginning in 2009 through multiple
4 acts on the part of Vale in taking and using our confidential
5 information to thwart our efforts, Rio Tinto's efforts, to
6 secure its rights to blocks 1 and 2. The action that the
7 government --

8 THE COURT: Say that again. Taking the information?

9 MR. LYLE: Taking and using that information to thwart
10 Rio Tinto's efforts to get back its rights to blocks 1 and 2.
11 In the time that the government of Guinea acted, Rio Tinto
12 challenged that conduct. It consistently challenged that from
13 2008 all the way up and through until April of 2011, which is
14 when Rio Tinto was ultimately forced at the hands of the
15 conspiracy to give up its claims against the government of
16 Guinea as it relates to blocks 1 and 2 of Simandou.

17 THE COURT: When did you start challenging in 2008?

18 MR. LYLE: We challenged it immediately, your Honor,
19 and consistently throughout that time period, as alleged in the
20 complaint.

21 THE COURT: I'm saying a date, a month. After you got
22 the letter?

23 MR. LYLE: Right. After the letter and at various
24 times throughout 2009, Rio Tinto asserted its rights and
25 challenged that action in the government of Guinea as we

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1 alleged. So the injuries that we're talking about are the
2 first set of RICO injuries that we're alleging occurred
3 beginning in 2009 as a result, as I described, of Vale's
4 conduct.

5 THE COURT: And those injuries again are what?

6 MR. LYLE: During that time period, Vale repeatedly
7 and through predicate acts took our confidential information
8 under the guise of a legitimate negotiator for part of the
9 rights to Simandou, which we were negotiating with them at that
10 time period as you may remember from the forum non conveniens
11 arguments. At that time in 2009, Rio Tinto and Vale were
12 negotiating for a joint venture as it relates to Simandou. At
13 that time, little did we know that they were in a conspiracy
14 with BSGR to take our rights to Simandou.

15 THE COURT: Right. You're confusing me because I'm
16 having trouble separating the rights to one and two to just
17 stealing your information. Is the RICO conspiracy just that
18 they stole information from you?

19 MR. LYLE: No, that they stole information and used it
20 to keep us from retaking our rights to blocks 1 and 2 of
21 Simandou. So in 2008, the government of Guinea --

22 THE COURT: That's odd, a little bit odd to me. It
23 would seem to me that you were concerned about them taking it
24 in the first place, not retaking it. I thought in your
25 complaint, in fact, in your complaint you said, among other

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1 things, you said this is a case about theft --

2 MR. LYLE: Yes.

3 THE COURT: -- of Rio Tinto's valuable mining rights.

4 That's the way I've always understood your complaint,
5 literally, the document, and also your complaints here in
6 court.

7 MR. LYLE: Yes.

8 THE COURT: And logically that's what one would think.
9 You had rights to one and two. You lost them, and that's
10 what's brought this all about.

11 MR. LYLE: That's right, your Honor. The question is
12 when did we learn.

13 THE COURT: I know, but that's sort of technical a
14 little bit. I'm confused with stealing your information versus
15 stealing one and two.

16 MR. LYLE: Understood.

17 THE COURT: Isn't that really what you're saying, they
18 took one and two from us?

19 MR. LYLE: They took one and two from us, yes.

20 THE COURT: That's the real gravamen of your injury,
21 right?

22 MR. LYLE: That is one aspect of our injury. And that
23 that was achieved, that taking of one and two --

24 THE COURT: We're going to dispute, I guess everybody
25 is disputing when that was achieved --

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1 MR. LYLE: That's right.

2 THE COURT: -- for RICO purposes, etc.

3 MR. LYLE: That's right.

4 THE COURT: So just say it again to me --

5 MR. LYLE: I'll clarify.

6 THE COURT: -- what is the gravamen of your complaint?

7 MR. LYLE: Our RICO claim, there are two injuries that
8 we claim under our RICO, under our RICO allegations. And we
9 have other allegations in our complaint which are common law
10 fraud and conspiracy to commit fraud, etc.

11 Our allegations are there are two RICO injuries that
12 stem from the defendants' conduct. The first one, to get right
13 to the point of blocks 1 and 2, that occurred in April of 2011.

14 THE COURT: Well, let's forget when it occurred, but
15 it's the taking of one and two is one injury, right?

16 MR. LYLE: Yes. That injury, we would say, so, yes,
17 that is our taking of one and two.

18 THE COURT: And the other?

19 MR. LYLE: And the other is at a time when the
20 government had purported to act, okay, in 2008, the government
21 did one thing. It reduced our rights to blocks 1 and 2 to
22 exploration rights, and then it purported to transfer
23 exploration rights to BSGR.

24 THE COURT: Right, December 2008.

25 MR. LYLE: 2008. This action is not a RICO injury.

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1 That is not a RICO injury because it wasn't achieved through
2 predicate acts. The RICO injury that we're alleging in
3 addition to the taking of one and two is that after that took
4 place, beginning in 2009 through the RICO conspiracy, Vale and
5 BSGR thwarted Rio Tinto's rights to take on the action that was
6 taking place by the government of Guinea in trying to reduce
7 our rights to blocks 1 and 2. And what they did --

8 THE COURT: It's not very clear to me still.

9 MR. LYLE: The way I think of it, Judge, is sort of
10 like if you're a fighter, if I'm taking the knock out blow of
11 taking blocks 1 and 2, that's April of 2011.

12 THE COURT: Well, whenever it is, we're going to get
13 to that in a minute.

14 MR. LYLE: That's our position, 2011, as we lay out in
15 our papers. They have a different view, but 2011. Along the
16 way we are struggling to challenge and take back what the
17 government had tried to do because it was improper, it was
18 illegal. We challenged it.

19 THE COURT: But it wasn't a RICO act.

20 MR. LYLE: It was not a RICO act in 2008, that's
21 correct. But the interference with our ability to take back
22 those rights through the acts of the conspiracy and at the same
23 time through Vale's conduct, taking our information and using
24 it in that effort to thwart our taking back, our challenge of
25 the rights that the government sought to reduce in 2008, those

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1 are the predicate acts that form the second injury of the RICO.

2 So there were two distinct. One is the body blows
3 along the way where they repeatedly took our information, used
4 it to convince the government through multiple government
5 changes. The government of Guinea changed over time between
6 2008 through 2011. There was a junta that took over. So you
7 have multiple times.

8 THE COURT: It's a mouthful, the second one is a
9 mouthful. I'm not sure I'm understanding. Maybe you can point
10 me to a paragraph in the complaint that says just what you
11 said.

12 MR. LYLE: In terms of the injuries?

13 THE COURT: Yeah.

14 MR. LYLE: So the predicate acts that I'm referring to
15 where they're interfering with our negotiations or they're
16 taking our information are if you look at paragraph 167 of the
17 complaint, that lays out the predicate acts that we're
18 referring to.

19 THE COURT: Paragraph 167 describes what the second
20 predicate act is just as you described it here?

21 MR. LYLE: The series of predicate acts that began in
22 January of 2009 moving forward. And also paragraphs --

23 THE COURT: Give me a sentence or two that captures
24 what you just said.

25 MR. LYLE: Also paragraphs 86 to 106. And let me grab

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1 my complaint so I can do that for you. I'm looking for one of
2 the best ones to give you.

3 THE COURT: I want to have one that's the same as your
4 oral comment.

5 MR. LYLE: Paragraph 94, your Honor.

6 THE COURT: And it says?

7 MR. LYLE: It says, Rio Tinto did not accept that its
8 rights to blocks 1 and 2 were actually rescinded. Instead, Rio
9 Tinto made every effort to convince the government of Guinea
10 that the recession was invalid and inconsistent with Guinean
11 law. As discussed in more detail below, Rio Tinto's efforts on
12 this front were consistently stymied by the enterprise,
13 particularly defendant Thiam, who as the minister of mines was
14 vested with the power to review and award mining permits in
15 Guinea.

16 And then we go through and allege in a number of
17 paragraphs, 95, beginning of 95, the acts of Thiam as the
18 minister of mines in intimidating Rio Tinto, taking steps to
19 further secure BSGR's and Vale's grasp on blocks 1 and 2.
20 Because Thiam was the minister of mines, he was a critical part
21 of that requirement that the minister of mines needs to take
22 action in order to provide the rights to BSGR and Vale.

23 And then we go on to further allege that this
24 intimidation took place in a variety of ways, not just through
25 official acts, but also as a result of bribery, but also acts

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1 where Thiam publicly and through the airways and on appearances
2 on CNBC and so on was making threats against Rio Tinto's
3 remaining rights that were not subject to any issues, blocks 3
4 and 4. So by threatening blocks --

5 THE COURT: This is not a lawsuit about blocks 3 and
6 4.

7 MR. LYLE: No. It's just that that was used as
8 leverage to force us to ultimately give up our fight for blocks
9 1 and 2.

10 THE COURT: Okay. I hear what you're saying, but I go
11 back to the complaint. The complaint also says that the U.S.
12 based enterprise's ultimate target was Rio Tinto's mining
13 concessions in the Simandou region of southeast Guinea.

14 You agree with that?

15 MR. LYLE: Yes.

16 THE COURT: And then you say in your complaint, the
17 defendants' conspiracy quickly began to bear fruit. So if it's
18 bearing fruit, it means it's already in place, right? The RICO
19 conspiracy can't bear fruit -- you're shaking your head. It's
20 not?

21 MR. LYLE: No.

22 THE COURT: How can it bear fruit if it doesn't exist?

23 MR. LYLE: It's a conspiracy. It's not a RICO
24 conspiracy at that stage. It can't be.

25 THE COURT: Oh, it's just a conspiracy, but it doesn't

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1 become a RICO conspiracy.

2 MR. LYLE: Yes, your Honor.

3 THE COURT: Because it says, that quickly began to
4 bear fruit when officials in the Guinean government announced
5 in December 2008 that the government had rescinded half of Rio
6 Tinto's Simandou concessions --

7 MR. LYLE: Correct.

8 THE COURT: -- blocks 1 and 2, and intended to assign
9 that interest to BSGR.

10 MR. LYLE: That's correct.

11 THE COURT: So that's not a RICO problem.

12 MR. LYLE: It can't be because that wasn't achieved by
13 RICO predicate acts. The only way that that could be a RICO
14 conspiracy is if it was achieved through predicate acts. The
15 predicate acts didn't begin until January of 2009.

16 THE COURT: How do you think that came about, it was
17 dropped down from the Guinean government from the sky? Nobody
18 did anything to cause that to happen?

19 MR. LYLE: We do believe that was part and parcel of
20 bribery and improper conduct on the part --

21 THE COURT: You call it a conspiracy.

22 MR. LYLE: Yes, but it's not a RICO conspiracy. It is
23 a common law conspiracy. It would be a common law fraud
24 conspiracy.

25 THE COURT: You charge common law conspiracy in your

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1 complaint?

2 MR. LYLE: Yes, we have common law fraud count.

3 THE COURT: Common law conspiracy.

4 MR. LYLE: Common law conspiracy to commit fraud
5 count.

6 THE COURT: You have that.

7 MR. LYLE: Yes.

8 In any event, even if we didn't have an allegation,
9 Judge, it isn't the RICO conspiracy, right. You can have a
10 conspiracy, you can commit acts. There's no question that what
11 happened in 2008 was a harm. We're not disputing that.

12 THE COURT: Not only was it a harm, but it's the harm.

13 MR. LYLE: No.

14 THE COURT: Oh, no, okay.

15 MR. LYLE: It's not because it wasn't, that didn't
16 happen. We didn't lose.

17 THE COURT: You're not saying it's not a harm because
18 it falls outside the statute of limitations, are you?

19 MR. LYLE: No, we're saying it's a harm. It is not a
20 harm that is the result of a RICO conspiracy. It's not a RICO
21 injury. What we're saying is that while that took place, while
22 that was a harm as a result of collaboration among the
23 defendants, there's no question about that, it can't be a RICO
24 injury because no predicate acts were committed.

25 THE COURT: I understand it can't be a RICO

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1 conspiracy, a RICO problem, because it's beyond four-year
2 statute of limitations. I understand that. But I'm not sure I
3 understand why it couldn't be a RICO harm.

4 MR. LYLE: It can't be a RICO harm because in order
5 for there to be a RICO injury, it has to be an injury that
6 results from predicate acts.

7 THE COURT: Okay. So what acts bore this fruit?

8 MR. LYLE: The 2008?

9 THE COURT: Yeah.

10 MR. LYLE: We would say Beny Steinmetz's and BSGR's
11 bribery of government officials resulted in that activity.
12 That, however, is not a RICO predicate act.

13 THE COURT: And why not?

14 MR. LYLE: Because it doesn't satisfy any of the
15 predicate acts under the statute. In order for that to have
16 occurred, in order for Beny Steinmetz's activities to subject
17 him as a non-U.S. entity, right, he would have to have engaged
18 in an FCPA violation for bribery, but in order for that to
19 happen, Mr. Steinmetz and BSGR at that time would have to have
20 a nexus to the United States, but they don't, so it's not a
21 FCPA violation. It's not a predicate act. The predicate acts
22 of corruption and FCPA violations under RICO extend as a result
23 of the Travel Act. That's not applicable to Mr. Steinmetz and
24 BSGR at that time.

25 So the injuries, that particular injury, Judge, at

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1 that time placing our rights under siege, that's our harm, and
2 then ultimately at the end -- and this is where we diverge from
3 them, from the defendants. April of 2011, when we are forced
4 into the settlement at the hands of the conspiracy because of
5 all the intimidation and threats against our remaining rights,
6 Rio Tinto is forced to relinquish its challenge to one and two
7 which it had consistently.

8 THE COURT: So that's ultimately 2011. But you say in
9 the complaint also, the result of defendants' scheme -- not
10 qualified in any way, I'm quoting you -- was a June 2009
11 official statement from Thiam on behalf of the government of
12 Guinea that confirmed the mining rights for Simandou blocks 1
13 and 2 previously held by Rio Tinto were now BSGR and
14 Steinmetz's.

15 MR. LYLE: Yes.

16 THE COURT: Sounds like the end to me.

17 MR. LYLE: It is not the end, your Honor, because that
18 doesn't take place. Because even then, if you think about the
19 two different injuries, that step in June of 2009, after all of
20 the things that had occurred in January of 2009 while
21 Mr. Steinmetz is bribing officials and Vale is taking our
22 information and providing that to the conspiracy to convince
23 the government and give them cover and comfort that they can
24 continue to keep the rights that they were purporting to
25 transfer in 2008, in 2009 that's culminating in another action

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1 by the government of Guinea, which is a step along the way.

2 But we continue even after that because we continue to protest,
3 as we've alleged in the complaint.

4 THE COURT: You call it the result of defendants'
5 scheme in June 2009. You didn't say a step along the way to
6 2011 happened in June 2009. You said, the result of
7 defendants' scheme was a June 2009 official statement from
8 Thiam on behalf of the government of Guinea that confirmed the
9 mining rights for Simandou blocks 1 and 2 previously held by
10 Rio Tinto were now BSGR and Steinmetz's.

11 You don't call that a step in the direction of 2011.

12 MR. LYLE: Yes, your Honor.

13 THE COURT: It sounds pretty definitive is what I'm
14 trying to say.

15 MR. LYLE: Yes, but it's not meant to be. And we
16 alleged the conduct continued.

17 THE COURT: Would you agree with me that it does sound
18 pretty definitively as a statement? I'm just quoting your
19 sentence.

20 MR. LYLE: It's not meant to be at all, Judge, that
21 that's the final step because we allege that there's continuing
22 conduct on the part of the defendants where they continued to
23 threaten blocks 3 and 4 after that date.

24 THE COURT: I know, but we've already agreed that
25 three and four is really not the subject of your grievance

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1 here.

2 MR. LYLE: Yes, but what I'm saying is that the
3 threats against three and four were used to get us to back off
4 of our challenge as it relates to blocks 1 and 2, which we
5 ultimately do in April of 2011.

6 THE COURT: Yeah. As you know, big disagreement about
7 that.

8 MR. LYLE: There is. When you look at --

9 THE COURT: I'm just looking at the statements and
10 they seem so definitive to me that it almost sounds like at one
11 time in drafting the complaint you were focusing on 2008, 2009.

12 MR. LYLE: 2009 though is not -- we have, if we read
13 the complaint in its totality and we give effect to the rest of
14 the allegations, it's clear that the story doesn't end then
15 because we have continued conduct on the part of the defendants
16 for a period well into 2010 and 2011. And, in fact, it
17 continues through 2013 up until the arrest of Mr. Cilins.

18 THE COURT: The story doesn't end, but blocks 1 and 2
19 are gone in 2009.

20 MR. LYLE: No, your Honor, they're not gone because if
21 they were gone, there would be no reason for continued threats
22 and intimidation to get us to give up our rights. And there
23 would be no need to have an agreement whereby we in 2011 gave
24 up our claim as to those rights to blocks 1 and 2 with the
25 government of Guinea.

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1 THE COURT: Except that's not what you say in the
2 complaint. You say that his letter, the June 2009 letter
3 confirmed the mining rights for Simandou blocks 1 and 2
4 previously held by Rio Tinto -- that's your client -- were now
5 BSGR and Steinmetz's. That doesn't say they're gone.

6 MR. LYLE: No. It can't say that they're gone
7 because --

8 THE COURT: What does it say? It says they were yours
9 and now they're somebody else's. That's not gone?

10 MR. LYLE: At that time, government of Guinea is
11 purporting to --

12 THE COURT: You didn't say he wrote a letter
13 purporting to do anything. You said he wrote a letter
14 confirming --

15 MR. LYLE: They did, the government did.

16 THE COURT: -- what some people could say happened
17 already in 2008 in December.

18 MR. LYLE: That's right.

19 THE COURT: So now he's confirming that the rights are
20 gone. They are not Rio Tinto's. How many letters does he have
21 to write?

22 MR. LYLE: Because even if he writes that letter, even
23 if that was his final decision, it didn't end the dispute
24 because Rio Tinto continued to assert the illegality of that
25 action, and, as we made multiple allegations beyond that date

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1 talking about continued conduct which culminates in April of
2 2011 when we have to, when we relinquish our rights. Only then
3 is it done.

4 Your Honor, if I could refer you to footnote 4 of our
5 brief on page 10.

6 THE COURT: I have to take a look at it. I'm always
7 suspicious of footnotes. I tell my clerks all the time if it's
8 important, don't put it in a footnote, put it in the text. But
9 I'm not suggesting your footnote 4 is not important.

10 MR. LYLE: Footnote 4 talks about how the
11 government -- I apologize we didn't include it in the text, but
12 it's an important footnote on this particular issue -- and it
13 talks about Rio Tinto being asked by defendant Thiam, we have
14 asked in vain for Rio Tinto to give us written confirmation
15 they have given up half of Simandou in accordance with the
16 mining code.

17 THE COURT: Please start that again. I'm not
18 following. I don't have it in front of me. Unless you have an
19 extra copy.

20 MR. LYLE: I do. I can bring it up to you. If I may
21 approach, your Honor.

22 THE COURT: Sure.

23 MR. LYLE: I don't have any notes. I don't think
24 there are any notes, but I should probably take it back.

25 THE COURT: This is footnote 4. I just want to follow

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1 along. I see it. It's in really small type also. But,
2 anyway, I can make it out.

3 MR. LYLE: So we have a parenthetical.

4 THE COURT: So you're saying -- do you want me to look
5 at the whole?

6 MR. LYLE: If you want, what I'm trying to get to --

7 THE COURT: You can read it. Yep.

8 MR. LYLE: I apologize. I'm looking in the
9 parenthetical.

10 THE COURT: Within footnote 4.

11 MR. LYLE: It says we have asked -- do you see that?

12 THE COURT: I do.

13 MR. LYLE: "We have asked in vain for Rio Tinto to
14 give us written confirmation that they have given up half of
15 Simandou in accordance with the mining code, Mines Minister
16 Mahmoud Thiam told Reuters in an interview late on Friday. If
17 this isn't done by February 2011, Rio risks losing the other
18 two blocks under its control and could definitely lose its
19 rights to the zone, he said."

20 THE COURT: Okay. And what does this prove?

21 MR. LYLE: What this is consistent with is that the
22 issue is not final in June of 2009. Even defendant Thiam,
23 who's minister of mines, recognizes that it wasn't a finality
24 because he's talking about this and asking for confirmation
25 that we've given up our rights, which we didn't do. That

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1 didn't happen, as I said.

2 THE COURT: It's a little metaphysical. In some
3 senses, nothing is ever done, but I get it. You're saying this
4 supports your contention that even the mining rights in one and
5 two are not gone?

6 MR. LYLE: They are not gone as of that time, not
7 until 2011.

8 THE COURT: I get it. They're not gone until what,
9 you entered the settlement agreement and gave them up?

10 MR. LYLE: Yes, under threats and intimidation against
11 our other remaining blocks. But for that, we wouldn't have
12 given up our rights. That's what we've alleged.

13 THE COURT: I get it.

14 MR. LYLE: Your Honor, the issue as it relates to the
15 statute of limitations is a question of when Rio Tinto knew or
16 should have known that it had suffered a RICO injury. The
17 first question is when. But the issue as it relates to the
18 statute of limitations is under the discovery rule and the
19 applicable law, it's when did Rio Tinto know or when was it
20 that it should have known that it had suffered a RICO injury.

21 THE COURT: That is definitely the issue.

22 MR. LYLE: That is the issue. As we've laid out, your
23 Honor, the time that that happened is April of 2010.

24 THE COURT: And why is it April of 2010?

25 MR. LYLE: Because April of 2010 is the time when Vale

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1 and BSGR announce the joint venture for Simandou, and, in the
2 course of making that announcement, reveal that they are using
3 our proprietary confidential information that we had conveyed
4 to Vale at a time when we believed that they were a legitimate
5 purchaser when they were not. They announced at that time
6 period that they were working together in a joint venture, and,
7 in the course of the announcement, revealed that they were
8 using our confidential information in advancement of that joint
9 venture. That's the first time that we were on inquiry notice
10 of that connection and that use of our confidential information
11 that we had provided to Vale.

12 THE COURT: You started providing confidential
13 information in December of 2008.

14 MR. LYLE: Starting providing in December of 2008.
15 Beginning in January of 2009, they became predicate acts
16 because --

17 THE COURT: You had no inquiry notice at that time.

18 MR. LYLE: None whatsoever. That's the first time.
19 That's a critical fact. There's two components to it, that
20 Vale and BSGR were working together as part of a joint venture
21 and that they were using our information that we had provided
22 to Vale to advance their efforts with respect to Simandou in
23 securing blocks 1 and 2 and then using that to their benefit as
24 a conspiracy. That's the first time. We filed our complaint
25 within four years of that date.

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1 THE COURT: Four years of April 2010.

2 MR. LYLE: Yes.

3 THE COURT: Well, I know.

4 MR. LYLE: And not only did we file in that time
5 period, under the law, as is laid out in -- as a result of
6 *Rotella v. Wood* and its progeny in the *Koch* case we've cited to
7 your Honor in the papers, we also at that time launched an
8 investigation. The fact that under the law, the *Koch* case, if
9 you launch an investigation at the time that you knew or should
10 have known, right, in April of 2010 in our case, the statute of
11 limitations is tolled for a period until such time as a
12 reasonable diligent investigation would reveal the RICO injury.
13 And in this case, so the fact is we filed in April of 2010, but
14 we had some time period even after that, Judge, in order to
15 file our complaint. So we complied with the statute of
16 limitations and the discovery rule in that regard.

17 The second point is -- that's the case that I started
18 off with which is Judge Preska's decision in the *Forde* case.
19 We also allege fraudulent concealment of the RICO conspiracy.
20 And what Judge Preska decided in the *Forde* case is that, and
21 *Rotella* recognizes it as an exception, fraudulent concealment
22 is an exception to the injury discovery rule of *Rotella v.*
23 *Wood*. What it says is that if there's fraudulent concealment
24 in the face of that, the statute of limitations is tolled for a
25 period of time until such time as a diligent investigation

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1 reveals the claim, the underlying conduct, the RICO conduct,
2 not the injury, but the conduct.

3 And so what happened in the *Forde* case is Judge Preska
4 was confronted with a situation where allegations had been made
5 involving an ERISA fund that was available to the carpenters.

6 THE COURT: He was president of the carpenters union.
7 I know the case very well.

8 MR. LYLE: A lawsuit was filed in 2006 in that case
9 against certain of the defendants. Subsequently, in 2009 --
10 and in that case it was embezzlement of funds that were part of
11 the plan. That conduct, the breach of fiduciary duty, all of
12 the conduct, all of the causes of action, the injury was the
13 embezzlement of the funds.

14 In 2009, a complaint, an indictment is released and a
15 new defendant appears, materializes for the first time, against
16 whom allegations of a RICO claim are brought. The claim was
17 brought two years later in 2011. The defendant said no, no,
18 no. You knew about all of the injury as it relates to the
19 conduct here back in 2006 because you filed a lawsuit. You're
20 barred by the statute of limitations.

21 Judge Preska says no, that's not right because of the
22 fraudulent concealment that the defendant engaged in in that
23 case, the statute of limitations was tolled until that time,
24 that is, in 2009, when the indictment against the defendant was
25 unsealed, and then the lawsuit was brought two years later. So

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1 in the face of a known injury, which was the RICO injury, the
2 embezzlement of the funds, the statute of limitations was
3 tolled.

4 In our case, the equivalent of the unveiling is the
5 arrest of Frederic Cilins in 2013, when the information and the
6 government's indictment of him as a defendant reveals all of
7 the conduct as it relates to the conspiracy. There were
8 agreements, bribery, all of that information became available
9 then.

10 THE COURT: So that's when the statute started to run?

11 MR. LYLE: That's when the statute starts to run under
12 fraudulent concealment. Yes, your Honor.

13 THE COURT: So your complaint is not late, it's early,
14 right?

15 MR. LYLE: We filed our complaint --

16 THE COURT: Well, right after that.

17 MR. LYLE: We filed our complaint a year later in
18 April of 2014.

19 THE COURT: I get it.

20 MR. LYLE: So it was timely under that analysis, your
21 Honor.

22 THE COURT: So you did not have to file until
23 April 2013.

24 MR. LYLE: 2014.

25 THE COURT: Four years.

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1 MR. LYLE: 2014. At the earliest, under the discovery
2 rule, right, April 2014 at the earliest. Under fraudulent
3 concealment we had time.

4 THE COURT: So you're back to 2017. That's your
5 theory.

6 MR. LYLE: Yes, under fraudulent concealment, which is
7 what we've alleged, your Honor.

8 THE COURT: That's why I was joking that it was early.
9 You have another year or two.

10 MR. LYLE: I understand, yes.

11 THE COURT: Okay. I got it.

12 MR. LYLE: And so that, by the way, your Honor, that
13 investigation continues, but we've alleged that and we talk
14 about the government investigation and ongoing investigations
15 of the federal government, the United States government,
16 following Cilins arrest, the government of Guinea's
17 investigation, as I mentioned, the DOJ and Southern District of
18 New York's investigation. In fact, we just received a subpoena
19 from the grand jury in this case seeking the documents in this
20 case and so that investigation is alive and well.

21 THE COURT: Well, yeah, I don't know. Forgive me, but
22 some people might start investigating them when they get a
23 letter from the government that says in December 2008, whoops,
24 we're taking your mining rights away, and then in June 2009
25 says, yeah, we're serious. Not only are we taking them, but we

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1 gave them to so and so. So some reasonable people might say I
2 better start looking into this.

3 MR. LYLE: We actually did, your Honor.

4 THE COURT: Yeah, and what did you find?

5 MR. LYLE: We didn't find any indication -- we found
6 no indication of Vale's involvement.

7 THE COURT: So you did an investigation starting when?

8 MR. LYLE: Right after December of 2008, through 2009
9 and 2010. In fact, our investigation efforts went into
10 through -- we just sat for depositions. We had four
11 investigative firms and five witnesses that were just deposed
12 in connection with this case, your Honor, four different
13 investigation firms that were retained, plus Rio Tinto's own
14 investigative efforts which began in 2008 and continued well
15 into the -- actively through 2010 and beyond. And the
16 defendants have had -- we just sat for depositions of our
17 private investigators on that front. So that investigation did
18 begin, as you would expect.

19 THE COURT: So what prompted that investigation?

20 MR. LYLE: Exactly what happened, the government's
21 change in its attitude toward Rio Tinto and the steps that it
22 was taking.

23 THE COURT: Right.

24 MR. LYLE: And so we wanted to understand what was
25 happening and why, and so that's why the investigations were

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1 launched.

2 THE COURT: And then so these investigations that come
3 after Cilins's arrest, those are new investigations?

4 MR. LYLE: After Cilins's arrest, those investigations
5 are government investigations. Those five different
6 governments are investigating.

7 THE COURT: No, yours.

8 MR. LYLE: Well, ours are in connection with our
9 claim, yes.

10 THE COURT: Having to do with the loss --

11 MR. LYLE: Yes, exactly.

12 THE COURT: So it's a continuation?

13 MR. LYLE: Absolutely.

14 THE COURT: So your investigation starts in 2008 and
15 continues to this day, I suppose.

16 MR. LYLE: Well, I think that's fair.

17 THE COURT: Okay. I get it. All right.

18 MR. LYLE: Were there any other --

19 THE COURT: Let me just look at my notes.

20 MR. LYLE: Based on your questioning, I thought
21 statute of limitations was the focus. But if there are other
22 issues, I'm certainly happy to address.

23 THE COURT: Well, I'm not necessarily saying it's the
24 focus, but you have to get over that, so to speak, to get to
25 anything else. I'm having trouble getting over the hurdle. So

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1 hold on.

2 So when you say in your complaint, you say beginning
3 in 2008, Vale entered into discussions with Rio Tinto to
4 purchase the Simandou concession while actively concealing from
5 Rio Tinto the material facts that, one, it was also in
6 discussions with the government of Guinea for some or all of
7 Rio Tinto's Simandou concession, and, two, it was evaluating
8 and considering defendants Steinmetz and BSGR as possible
9 partners to pursue Rio Tinto's Simandou concession.

10 You say that, right?

11 MR. LYLE: Yes, your Honor.

12 THE COURT: And that, I take it, is a true statement,
13 right?

14 MR. LYLE: Yes.

15 THE COURT: And so the investigation that you started
16 in December of 2008 came up blank with respect to these
17 allegations?

18 MR. LYLE: Yes, your Honor. We did not know that --

19 THE COURT: You were investigating, but you didn't
20 find this out.

21 MR. LYLE: No, no. We did not find out any of the
22 underlying conduct as a result of our investigations that would
23 shed light on Vale's involvement.

24 THE COURT: And then you also say at the November 24,
25 2008 meeting, Rio Tinto provided Vale with a confidential

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1 briefing about the status of its Simandou concession and the
2 attempts of Steinmetz and BSGR to steal it.

3 MR. LYLE: Yes.

4 THE COURT: So how did you know that?

5 MR. LYLE: That information was information that we
6 had, as it relates to BSGR --

7 THE COURT: I get it. Just on its face, right.

8 MR. LYLE: It's an important distinction for purposes
9 of the RICO conspiracy, yes. So we had information as relates
10 to BSGR's conduct which we conveyed to Vale, which then gives
11 them the idea to go team up with BSGR. It's the teaming up
12 part we didn't have an inkling about, not until April of 2010
13 when we had inquiry notice.

14 THE COURT: And also at that same meeting in New York,
15 this is the meeting in New York on November 24, 2008, Rio Tinto
16 discussed and confirmed for Vale that BSGR was now specifically
17 targeting Rio Tinto's Simandou concession.

18 MR. LYLE: Yes. These are all allegations as they
19 relate, your Honor, to BSGR. It's the teaming up with Vale
20 which leads to the RICO component, which we didn't learn of
21 until April of 2010 when we had inquiry notice.

22 THE COURT: And you also informed Vale that BSGR
23 Guinea had obtained written assurances from the minister of
24 mines on November 3, 2008, that the government -- Guinea, I
25 guess.

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1 MR. LYLE: Yes.

2 THE COURT: -- would withdraw Rio Tinto's Simandou
3 concession. That's right too?

4 MR. LYLE: Yes.

5 THE COURT: Okay. I get it. I don't have any more
6 questions on this subject.

7 Did you want to say something else on your other
8 issues?

9 MR. LYLE: I'm happy to do that now if there are
10 issues that your Honor has as it relates to any other ones.
11 Otherwise, I'm happy to respond to whatever the defendants say
12 if that makes sense.

13 THE COURT: That does. Sure. Let's hear from them.

14 MR. LIMAN: Thank you, your Honor. Before I get
15 started, I wanted to, having sat through the beginning portion
16 of your Honor's session this morning where you introduced the
17 members and admitted the members of the bar, just it was a
18 reminder what a special privilege I think it is for all of us
19 to appear in the mother court and to appear in front of your
20 Honor and I wanted to thank your Honor for that and to note how
21 meaningful the words were, not just for the people being
22 admitted, but for I think everybody in the courtroom.

23 I'm Lewis Liman. I'm prepared to speak on behalf of
24 all of the defendants with respect to the common issues and
25 with respect to Vale. If there are questions with respect to

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1 personal jurisdiction, those will be addressed by Mr. Filardo
2 on behalf of BSGR and Steinmetz, as well as perhaps
3 Mr. Auerbach. I was told before court today that Mr. Summit on
4 behalf of defendant Thiam might have a word or two, want a
5 minute or two to address any issues.

6 THE COURT: Okay.

7 MR. LIMAN: I do have some responses and things I want
8 to highlight.

9 THE COURT: That was going to be my first question to
10 you. What do you think about what you just heard?

11 MR. LIMAN: I think it ends the case, frankly, your
12 Honor, and I'll tell you a couple of reasons why. Your Honor
13 asked twice questions about when it was that Rio Tinto first
14 began investigating or complaining. That was a question that
15 your Honor asked early on. It was a question that you asked
16 towards the end. And the answer was we started to complain
17 right away in December of '08 and in '09.

18 And I think that answer was telling and, again,
19 dispositive because what was Rio Tinto complaining about. They
20 were complaining about the very thing that's alleged in the
21 complaint which is what they claim to have been the theft of
22 Simandou, precisely as your Honor pointed to paragraph 1 of the
23 amended complaint, exactly what they say the injury is in this
24 case, the loss of the mining rights.

25 Your Honor then asked about injury and where the

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1 claims were made about injury that are now being made in the
2 opposition brief and that you heard. And it was a surprise to
3 us when we got the opposition brief. We thought this case was
4 an entirely different case. What we're hearing is entirely
5 different from what we've been litigating. It was telling that
6 the answer that you got was not a reference to a paragraph in
7 the complaint that referred to injury. It was a paragraph,
8 paragraph 167, that referred to predicate acts.

9 And as your Honor pointed out and knows, there has to
10 be both injury and predicate acts and the two of them have to
11 be linked, there have to be predicate acts that then lead to
12 the injury. If there's an injury and there are no predicate
13 acts, which is what they admitted to your Honor, then there is
14 no recovery under RICO.

15 They then pushed a little bit about where it appears
16 in the amended complaint and they referred your Honor to
17 paragraph 94, which we would note says nothing whatsoever about
18 a settlement agreement in 2011. That doesn't appear anywhere
19 in the complaint. And as your Honor has known for a long time,
20 you can't amend a complaint in opposition briefs. I would cite
21 back to your Honor your Honor's opinion in the *Cadbury*
22 *Schweppes* case where you made precisely that point and for all
23 of the right reasons.

24 But what was telling to us is that not only does
25 paragraph 94 not refer to any separate injury, but if you read

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1 on just one sentence beyond what they cited, the next heading
2 on page 29 -- so they cited you to paragraph 94 on page 28. If
3 you look to page 29 -- I can pass it up, your Honor.

4 THE COURT: If you have.

5 MR. LIMAN: The heading with respect to on page 29,
6 the very next sentence, if you can give me a moment, your
7 Honor, is the enterprise continued to defraud and intimidate
8 Rio Tinto to ensure that the award to BSGR was finalized.

9 Now, we dispute and Mr. Summit can address the issues
10 with respect to intimidation. They're not intimidation
11 whatsoever. They don't support a predicate act. But the
12 significant thing is that that section, the section about the
13 award to BSGR being finalized, ends on paragraph 100 with a
14 sentence very similar to the sentence that your Honor read and
15 this is at the end of paragraph 100. Thiam's June 29, 2009
16 letter on behalf of the Guinean government made the initial
17 December 2008 award of Simandou blocks 1 and 2 to BSGR official
18 until the Guinean government recently revoked BSGR and Vale's
19 rights to Simandou blocks 1 and 2. That's what they claim is
20 the finalization of the loss that occurred earlier.

21 Now, why do we say that this is important, why is this
22 action critically important? It's important for at least two
23 separate reasons. One is the statute of limitations. I'm
24 happy to address Judge Preska's opinion or any of the other
25 issues with respect to that. The other is the question of

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1 whether there was a pattern of racketeering. And the third is
2 whether there was June of 2011 has any relationship. We
3 believe that the loss occurred in December of '08. That's
4 what's pled in the complaint. That's what happened.

5 THE COURT: And what flows from that if you're right?

6 MR. LIMAN: What flows from that is that the statute
7 of limitations begins to run in December of '08 because they
8 knew they lost the money. It also means that they cannot
9 recover for that loss, for any damages incurred by the loss of
10 Simandou blocks 1 and 2 because, as they admitted and we argued
11 in the beginning of our brief, there's no pattern of
12 racketeering that causes that loss. That, to our minds, also
13 ends the case because December of '08 is in fact the only loss
14 that's alleged.

15 THE COURT: Ends the RICO claim?

16 MR. LIMAN: It ends the RICO claim. The other claims,
17 the only basis for jurisdiction is supplemental jurisdiction.

18 THE COURT: Right.

19 MR. LIMAN: It ends the RICO claim.

20 THE COURT: So it ends. And what about this, as I
21 think counsel was saying, Mr. Lyle was saying it's the theft of
22 information that is really the problem here, not the loss of --
23 well, I'm overstating it, but what about that?

24 MR. LIMAN: I don't think you're overstating their
25 argument today. I think it is misstating what the complaint

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1 alleges.

2 THE COURT: It does seem to be somewhat at odds with
3 what the complaint states.

4 MR. LIMAN: Right. What the complaint alleges, if I
5 could grab my copy of the complaint back, your Honor. It's got
6 my little post-it with the paragraph I wanted to bring to your
7 attention. One of many paragraphs that I would draw your
8 Honor's attention to is paragraph 159.

9 THE COURT: What page is that?

10 MR. LIMAN: That is on page 46, your Honor.

11 THE COURT: Got it.

12 MR. LIMAN: This is the paragraph that talks about the
13 RICO enterprise's common purpose.

14 THE COURT: Yeah.

15 MR. LIMAN: And it talks about the fact that the
16 allegation is that there was a meeting in 2008 to discuss the
17 proprietary information Vale learned from Rio Tinto -- in 2008,
18 notably, before there was any predicate act committed. The
19 predicate acts against us are only in January and February of
20 2009 -- and obtained confidential information in a bid to
21 wrongfully acquire Rio Tinto's Simandou concession.

22 I would also point your Honor to a number of other
23 paragraphs. Paragraph 1, this is a case about the theft of Rio
24 Tinto's valuable mining rights. Paragraph 10, Vale armed
25 Steinmetz and BSGR with Rio Tinto's research and development to

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1 persuade officials in the Guinean government to accept their
2 bribes and go along with the illegal scheme. Paragraph 14,
3 RICO enterprise's ultimate target was the mining concession
4 which was taken by June of 2009. Paragraph 87, 89,
5 paragraph 166, all for the same point.

6 The point, your Honor, is that the information that
7 was allegedly taken was not information that they allege had
8 independent value to Vale or BSGR with respect to mining
9 generally out there in the world. Their claim is that
10 information was taken because it was of use in obtaining the
11 Simandou blocks 1 and 2.

12 THE COURT: Right.

13 MR. LIMAN: That's why it's a loss.

14 THE COURT: And if that's so, then what?

15 MR. LIMAN: If that's so, your Honor, first of all, it
16 would have occurred in November and December of '08. So for
17 purposes of statute of limitations, that's when the loss
18 occurs. Also, for purposes of statute of limitations, it means
19 that the loss is the loss of the mine. They knew the loss of
20 the mine. They were on inquiry notice of their loss. What
21 they're talking about with you is notice of the claim, exactly
22 what *Rotella* said is not required, what *Rotella* rejected. So
23 statute of limitations clock begins running.

24 It also means that there's no pattern and no pattern
25 that caused the loss because for two reasons -- one, only two

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1 predicate acts alleged against any defendants with any
2 specificity up until June of 2009. Those two are alleged
3 against Vale. They're the only things alleged against Vale in
4 terms of predicate acts after February of '09, they end. Those
5 two acts are alleged to have taken place in a one-week period,
6 January 29, February 4. We've argued in our briefs why neither
7 of them satisfy 9(b). But under *Linens of Europe*, other cases,
8 those are considered to be one predicate act.

9 More importantly or just as importantly, those don't
10 make out a RICO pattern. They don't satisfy closed-end
11 continuity. They don't satisfy open-ended continuity. It all
12 began and ends within a short period of time. That's the
13 reason why it's so critical that the allegation here is that
14 the information is used for the purpose of obtaining blocks 1
15 and 2. It's not that it's got independent value out there in
16 the world.

17 There is, it does seem like their argument, and is it
18 another reason why I think that colloquy that I just heard
19 should end the case, much of what your Honor heard was claims
20 that what the wrong here was that we disputed the theft of our
21 property. We were trying to get the theft of our property back
22 and these fellows, the defendants, interfered with our attempts
23 to get that property back.

24 And I think just as your Honor's question with respect
25 to statute of limitations, not presuming it's a point, but your

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1 Honor's question about the statute of limitations sort of
2 proved the sort of the limiting principle, and there is no
3 limiting principle to their argument. So too here their theory
4 about interference with attempt to get property back really has
5 no limiting principle, finds no support in the law.

6 It means, in essence, that if I were to steal
7 Mr. Blackman's property and Mr. Blackman was to say to me I
8 want that property back and I was to continue to hold on to it,
9 he could bring a RICO claim whenever, as long as he was able to
10 establish the predicate acts. There are two separate
11 independent elements -- one is injury and one is the pattern.
12 And under that theory, you would essentially have no statute of
13 limitations. It's a point the Second Circuit has made.

14 I think, your Honor, those are the points that I
15 wanted to highlight. A lot of other points are addressed in
16 the brief. We've cited a lot of other cases. I know your
17 Honor has studied the papers. I'm happy to respond to any
18 questions.

19 THE COURT: So between 2008 and June 2009, which do
20 you think is the operative date? I mean I think I know what
21 you think.

22 MR. LIMAN: Your Honor, I think the critical date is
23 December of 2008 because in order for something to have been
24 finalized, something had to have happened to have been
25 finalized.

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1 THE COURT: Got it. Okay. All right.

2 So now did you want to talk about, you said at the
3 outset that there are three principal parts of your
4 presentation. I don't have questions beyond that at the
5 moment. I don't want to preclude you from saying anything else
6 that you wanted to say.

7 MR. LYLE: Thank you, your Honor. Do you want me to,
8 should I address what Mr. Liman has?

9 THE COURT: Whatever you like. I'm not suggesting
10 that you need to summarize what's in your papers. But if you
11 wanted to make any further points about other issues and/or
12 Mr. Liman's comments, this is the opportunity to do that.

13 MR. LYLE: Thank you, your Honor.

14 The allegations that Mr. Liman focused on and the
15 questions that you had, in follow up to the questions you had
16 been asking, in order for there to be a RICO injury, it has to
17 be the result of predicate acts. And with respect to the
18 conspiracy that we've also alleged under 1962(d), there has to
19 be an agreement to conspire to violate RICO. And in a civil
20 case, which is what we have here, there has to be a predicate
21 act and that's the Supreme Court's decision in the *Beck v.*
22 *Prupis* case, which is 529 U.S. 494.

23 And in this case, the only way then that there can be
24 a RICO injury giving rise to our claim, a RICO injury, there
25 had to be a predicate act and there are no predicate acts

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1 alleged until 2009.

2 THE COURT: I think Mr. Liman would thoroughly agree
3 with you and say there is no RICO claim. It doesn't have to be
4 a RICO claim.

5 MR. LYLE: I'm saying as it relates to the date of
6 2008, because their argument is we suffered our injury in 2008.

7 THE COURT: That's precisely his point -- it's over at
8 that time and it's not a RICO violation. Whatever happened,
9 whatever it is, maybe you had a lawsuit about it or maybe you
10 didn't. It probably wasn't a RICO lawsuit, maybe some other
11 kind of lawsuit. But you brought a RICO lawsuit.

12 MR. LYLE: We did, your Honor. And we've alleged
13 under the case law that we've cited, those actions are RICO
14 injuries. And, ultimately, we have two categories of injuries
15 that we're talking about. The first one is as a result of the
16 predicate acts that occurred in 2009 going forward. And then
17 the ultimate -- separate and distinct injury is not just all of
18 the efforts in beating back our attempts to get one and two
19 back through multiple governments, but the ultimate injury in
20 April of 2011.

21 THE COURT: What does multiple governments mean, does
22 the clock start when there's a new election?

23 MR. LYLE: Each government that took over --

24 THE COURT: You start all over again?

25 MR. LYLE: Each new incoming administration refocused

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1 on their --

2 THE COURT: I know that. But new four years at every
3 election or something like that?

4 MR. LYLE: Yes, your Honor. There are ongoing actions
5 to assess and reassess one and two, right. And they looked at
6 all mining, but specifically Rio Tinto in blocks 1 and 2. And,
7 in fact, we have allegations that defendant Thiam stayed on as
8 minister of mines from one administration to the next, he did,
9 and he was constantly being paid by BSGR, as a result,
10 continued his siege against our rights on one and two. That is
11 a RICO injury.

12 A separate injury, separate and distinct from that, is
13 April 2011, when we're forced to relinquish our rights because
14 of the ongoing intimidation by Thiam which continued well past
15 the June 2009 date that you're talking about. In fact, we've
16 got an allegation in paragraph 116 which I neglected to mention
17 to you earlier which I want to draw your attention to where it
18 says on October 4, 2010, Minister Thiam, the defendant,
19 publicly stated that Rio Tinto had until February 2011 to
20 formally waive its rights to blocks 1 and 2. Thiam further
21 stated that if Rio Tinto did not waive its rights to one and
22 two, it risked losing its rights to blocks 3 and 4.

23 That's the ongoing siege against our rights that I was
24 referring to. And we have other allegations in the complaint
25 along those lines. Every effort we had to try to secure the

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1 rights to one and two, the defendants jumped on and interfered
2 with it. They stopped us from being able to get what was
3 rightfully ours.

4 The RICO aspects can only occur after, right, December
5 of 2008. It can't beforehand. And in setting aside that, your
6 Honor, the question that we have to ask is when did Rio Tinto
7 know or when should it have known, which we already talked
8 about.

9 Mr. Liman didn't address the *Koch* case. And he didn't
10 refute anything I said about fraudulent concealment, which is
11 what we've alleged in the case under Judge Preska's decision in
12 the *Forde* case, which indicates that if defendants are engaged
13 in a course of concealment, which we've alleged by the nature
14 of their acts and affirmative actions that they took, they
15 prevented Rio Tinto from discovering the basis of its RICO
16 claim separate and distinct from the injury. Even if you know
17 you've been injured, even if you know you've sustained an
18 injury under the Preska decision in the *Forde* case, in the face
19 of fraudulent concealment, the statute of limitations is
20 tolled. You didn't hear anything from the defense on that
21 argument, your Honor.

22 THE COURT: I should ask him about it. I will.

23 MR. LYLE: Thank you.

24 THE COURT: Hold on.

25 So what about it, Mr. Liman? He's saying, I think as

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1 to your client in particular, that your client was more than
2 silent, but that your client lied during negotiations with his
3 client and concealed, consequently.

4 MR. LIMAN: I think that's the kind of allegation that
5 both the *Forde* case and every other case in this district and
6 in this circuit needs to be supported by well-pleaded
7 allegations and not just by conclusory statements. Not only is
8 it not supported by well-pleaded allegations, but the evidence
9 before your Honor, the pleadings, the documents incorporated in
10 it, make it perfectly clear that my client had the absolute
11 right to enter into a joint venture with BSGR in April of 2010.

12 There's no allegation that we lied to them. There's
13 still been no specification for any lies that we told to them
14 or any act of concealment. All they're alleging is that in
15 January of 2009, we said that we would be interested in
16 Simandou. We were interested in Simandou. When they lost it,
17 we ended up engaging in a joint venture with BSGR; and the
18 January of '09 agreement said we can do that. And in February,
19 a couple days later, we said we're still interested in the
20 agreement to get Simandou.

21 I don't think there's anything fraudulent with respect
22 to that. If those kinds of allegations are accepted, this
23 courthouse is going to be flooded with cases that are ancient.

24 THE COURT: All right. Those are the issues that were
25 on my mind. There were others that wanted to be heard back

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1 there.

2 MR. SUMMIT: It's almost good afternoon, your Honor.
3 Paul Summit for Thiam. Thank you for your time, and I
4 represent defendant Thiam. I'm not going to get into the
5 statute of limitation argument, which has been ably
6 represented. I want to focus on a number of Thiam specific
7 points briefly.

8 The predicate acts simply disappear upon scrutiny.
9 Let's start with the alleged bribes. First of all, the
10 allegation of bribery is incredibly sparse and does not pass
11 9(b) scrutiny and that's in two respects. No. 1, they barely
12 allege a \$100 million bribe in installments to Thiam. But
13 also, No. 2, and perhaps more to the point for the Foreign
14 Corrupt Practice Act issue, they then say that defendant Thiam
15 distributed those bribes to other government officials.

16 Now, they had to add that redistribute allegation. It
17 wasn't in the first complaint. They added it in the amended
18 complaint. They don't name a single other official. They
19 don't name a single time or place. They don't name a single
20 amount. They say nothing but the rote assertion in numerous
21 places, he distributed to others. The reason they added that,
22 that they felt they had to add that, was that it is completely
23 clear under the case law that Thiam, as a foreign official,
24 cannot be prosecuted under the Foreign Corrupt Practices Act,
25 even if he did get this barely alleged bribe.

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1 So the FCPA predicate act falls out. Rio Tinto
2 doesn't challenge that. Rio Tinto concedes *sub silentio* that
3 there can be no FCPA again Thiam, there can be no FCPA for an
4 alleged receipt of bribe. So they allege the redistribution in
5 rote, which is utterly inadequate under 9(b). And they cite no
6 case law in any event that the redistribution would have
7 constituted an FCPA violation anyway. So that predicate act
8 disappears.

9 The money laundering, which is a second predicate act,
10 is supposed to be based upon a purchase of a property in
11 Westchester in 2011. There's absolutely no showing that either
12 that any bribe money was used, assuming it existed, for the
13 purchase of that property or that it in any way perpetuated a
14 scheme.

15 And, finally, the mail and wire fraud allegations are
16 all alleged post April 2010. They are anodyne, truthful
17 statements. You can find them at paragraphs 111 to 116 of the
18 amended complaint. They are simply statements to the media
19 about a public dispute that was already ongoing as Rio Tinto
20 alleged that its rights had somehow been taken from it
21 improperly back in December of 2008. So there's absolutely no
22 reliance. There can be absolutely no showing of reliance, and
23 they are completely silent on the question of reliance.

24 So defendant Thiam stands behind the arguments that
25 have been made ably as to statute of limitation. But there are

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1 a whole independent set of reasons that are set forth I think
2 amply in the papers as to why there are no predicate acts
3 anyway as to him.

4 And also, by the way, fraudulent concealment for
5 purposes of statute of limitation, as your Honor is well aware,
6 has to be proved defendant by defendant; and there's absolutely
7 no showing that Thiam or, for that matter, any of the other
8 defendants fraudulently concealed the injury.

9 THE COURT: Anybody else at that table want to be
10 heard?

11 MR. FILARDO: Good morning, your Honor, Vincent
12 Filardo from Mishcon on behalf of defendants BSG Resource and
13 Mr. Steinmetz. I'd like to be heard briefly on the personal
14 jurisdiction issues.

15 Your Honor, I just want to start by saying that
16 defendants BSGR and Steinmetz agree with the representations
17 made by plaintiff this morning that BSGR and Mr. Steinmetz do
18 not have a nexus to the United States. And, indeed, at
19 plaintiff's request, there was jurisdictional discovery taken
20 in this case on precisely that issue, meaning on general
21 jurisdiction over Mr. Steinmetz and BSGR, their minimum
22 contacts with the United States, not just New York, and their
23 relationship with any alleged agents here in the U.S. and the
24 activities of those agents here in the U.S. And, of course, in
25 the complaint, the only agent that's alleged is Mr. Cilins.

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1 And in Judge Peck's deliberations on the scope of
2 jurisdictional discovery, he asked plaintiff's counsel to name
3 the agents that they believed they needed discovery from and
4 they only identified Mr. Cilins, and that was in the
5 November 3, 2014 hearing transcript before Judge Peck, for the
6 record, on page 28, lines 4 to 5.

7 After having had that discovery, there was absolutely
8 no evidence of any connection, jurisdictional connection
9 between Steinmetz and BSGR to the U.S. or to New York. There
10 was no evidence provided that shows an agency relationship
11 between my clients and Mr. Cilins, and no evidence certainly
12 that we directed any of Mr. Cilins's activities here.

13 Having had that level of jurisdictional discovery, it
14 was plaintiff's burden and they failed that burden to prove
15 that jurisdictional connection on those bases. And, indeed,
16 the only specific allegation they had with respect to
17 jurisdiction over my clients was that with respect to
18 Mr. Steinmetz allegedly having owned or used property here in
19 Manhattan. There was no discovery that came up that proved
20 that. And at Judge Peck's request, Mr. Steinmetz submitted a
21 sworn declaration refuting those allegations. In fact, he did
22 it on two separate occasions, as your Honor knows based upon
23 the briefing.

24 Given that, plaintiffs shift, it appears, in their
25 opposition to really focus on the activities of coconspirators

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1 here in the U.S. But, at the outset, it's important to
2 recognize, and we put this in our brief, that minimum contacts,
3 federal constitutional minimum contacts, are going to play out
4 across any theory other than general jurisdiction of
5 jurisdiction in this case. And, again, there was minimum
6 contact jurisdictional discovery taken. Nothing was shown to
7 establish those minimum contacts.

8 And, in fact, plaintiffs had even asked for nationwide
9 contacts in light of 4(k)(2). They received that expressly
10 from Judge Peck and, again, there was nothing shown to
11 establish those minimum contacts on a nationwide or New York
12 basis. And certainly what's required under due process is an
13 intentional effort to direct activities at the forum state and
14 that there be a harm that either exists in the forum state or
15 is developed in the forum state.

16 And the complaint, the amended complaint and the
17 original complaint don't allege a harm in New York, and I'm
18 happy to discuss why that is the case. But, certainly, we have
19 an Anglic Australian company that's headquartered in the U.K.
20 and they have alleged a harm to their Guinean mining interests
21 and no harm has been alleged in New York or even the U.S.

22 So instead what remains is has there been a prima
23 facie standard met with respect to any kind of activities of
24 coconspirators and clearly there hasn't. There's a single
25 specific statement of conspiracy between BSGR and Vale about a

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1 conspiracy to have taken place in Guinea. That's not enough
2 for jurisdictional purposes. For jurisdictional purposes,
3 there needs to be allegations that are made that are akin to
4 agency allegations that BSGR directed the activities of its
5 coconspirators, that they did it on behalf of BSGR, that those
6 activities were for the benefit of the conspirator, and, again,
7 that there was an awareness, that BSGR would have had an
8 awareness of an effect in New York. None of those allegations
9 appear in this complaint, nor really can they given the balance
10 of allegations.

11 So at that point what is left really is, is there any
12 other jurisdiction under New York law. And, again, without
13 having properly alleged that connection, it's akin to an agency
14 connection. There can be no direct, whether it's under
15 302(a)(2) or (a)(3), jurisdiction in New York over BSGR. And,
16 again, I'll address that just quickly here.

17 Leaving aside the connection of coconspirator agency
18 sufficiency allegations, there has to at least have been under
19 302(a)(2) an allegation of a tort or activity occurring here in
20 New York. And plaintiffs took some issue with us calling Vale
21 as an alleged coconspirator, their use of the confidential
22 information that they gathered when they were in New York in
23 November of 2008 as being a breach of contract. Well,
24 regardless of how the Court wants to treat that activity,
25 whether it's a breach or whether it's a misuse of confidential

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1 information, it's clear that that did not take place in New
2 York. That access was pursuant to a lawful confidentiality
3 deed and data access agreement that was negotiated before Vale
4 was even in New York. That access occurred in New York, but
5 then the use was alleged to have taken place somewhere outside
6 of New York. It appears to be Guinea, but it's really not
7 clear. But, in any event, if a breach occurred, it was outside
8 of Guinea.

9 THE COURT: I'm sorry?

10 MR. FILARDO: It's outside of New York, excuse me.
11 And if a misuse occurred, the misuse, the location of that
12 tort, the place of that tort would be in the place of misuse.
13 And that's the *V. Cars* case that we cite in our reply, *V. Cars*
14 *v. Israel Corp.* So clearly 302(a)(2) doesn't apply with
15 respect to Vale.

16 And with respect to Thiam, the allegations that are
17 made against Thiam, because it's specific jurisdiction under
18 302(a)(2), none of the claims are arising out of those
19 allegations. His appearance on the television program, the
20 statements he made while he was in New York, the claims just
21 simply don't arise out of it and it's required that they do.

22 Finally, with respect to 4(k)(2), I think I touched on
23 this again. 4(k)(2) is a limited applicability. It needs to
24 have minimum contacts. And once minimum contacts aren't
25 established, there's no real further inquiry that's necessary.

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1 Already touched upon that. But courts in this district have
2 found that trying to use the activities of coconspirators to
3 somehow foist jurisdiction under 4(k)(2) is not allowable. I
4 don't think the Court even needs to go there given the fact
5 that we had jurisdictional discovery.

6 And those are the main points. I could address
7 1965(a) and (b) if the Court would like, but I'll leave that to
8 the Court's decision.

9 MR. AUERBACH: Good afternoon, your Honor. Martin
10 Auerbach for the VBG defendants. I promised my brethren I
11 would be brief and I will be. I ask only whether the Court has
12 any doubt as to the need to dismiss my client, a foreign
13 country, companies with absolutely no alleged contact to the
14 United States. I think there's more than ample basis to
15 dismiss the entire case. If your Honor has any question or any
16 doubt as to the necessity of dismissing my client, I'd be happy
17 to address that. If not, I'd be happy to sit down.

18 THE COURT: I don't have questions for you. It
19 doesn't mean I agree with the ultimate legal conclusion. I
20 didn't finish the opinion yet. But I don't have any questions.

21 MR. AUERBACH: Thank you, your Honor.

22 THE COURT: Anybody else from the back, so to speak,
23 the defense table?

24 So now you get the last word, Mr. Lyle, to respond to
25 what you've just heard if you wish.

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1 MR. LYLE: Thank you, your Honor.

2 With respect to BSGR's issues, as it relates to
3 counsel's arguments on personal jurisdiction, to clarify the
4 point that he first seized on where I said there was no nexus
5 to the United States, I was referring to in the time period in
6 November, December 2008. That obviously changes going forward
7 because our arguments as it relates to what they did subsequent
8 to those dates shows that BSGR has sufficient contacts to the
9 United States and to New York.

10 THE COURT: As of when?

11 MR. LYLE: As certainly as of 2009, in January 2009
12 going forward.

13 And, your Honor, when you look at the issue of the
14 discovery that Mr. Filardo referred to, there has been very
15 limited discovery as it relates to jurisdiction. There's been
16 no substantive hearing and there's been no evidentiary hearing
17 of any kind as it relates to the question of jurisdiction.
18 Judge Peck had a very narrow view as it relates to discovery.
19 There have been no depositions on this, as deposition
20 discovery, as your Honor knows, has been stayed at the request
21 of the parties. Mr. Cilins has not been deposed. Nobody from
22 BSGR has been deposed on these issues.

23 BSGR has steadfastly resisted discovery in the normal
24 rules of civil procedure forcing us to go through the Hague,
25 which therefore limits dramatically the type of information

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1 that you're able to obtain.

2 So to suggest that somehow there's been this robust
3 discovery opportunity and an evidentiary hearing based on
4 that --

5 THE COURT: I don't think anybody said there was an
6 evidentiary hearing.

7 MR. LYLE: I stand correct -- that there's been robust
8 discovery, and as I've said, there was no evidentiary hearing.
9 I refer your Honor to the cases we've cited in our papers on
10 that score as it relates to the burden that we have with
11 respect to establishing jurisdiction.

12 And if you look at our allegations and we've laid out
13 in our papers there are independent bases for finding personal
14 jurisdiction under 302(a)(2), we've alleged a conspiracy and
15 acts committed in furtherance of that. We have Vale's actions
16 that took place in New York as a result of the conspiracy which
17 BSGR is charged with under the cases we've cited in our papers.

18 The actions of Mr. Cilins and the attempted bribery of
19 defendant Toure and all of the conduct that resulted in
20 Mr. Cilins's arrest which is alleged here and effort to destroy
21 evidence, all of that is alleged to have occurred at the
22 instruction and request of BSGR and Mr. Steinmetz, sending an
23 agent of Mr. Cilins into the United States. And Mr. Cilins was
24 incarcerated here in New York, as your Honor well knows, after
25 he was released and fled the country. All of those actions

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1 were purposeful actions taken at the behest and at the request
2 of and under the instruction of BSGR, as we've laid out. All
3 of those things satisfy 302(a)(2).

4 As it relates to the other nexuses for purposes of
5 jurisdiction under the RICO statute, all need be alleged and
6 shown is that at the time of the complaint, there was an agent
7 who was here in New York, which was Thiam.

8 And, lastly, we've laid out in our papers and I'll
9 stand on our assertions on that as it relates to 4(k)(2). But
10 if you look at what defendant BSGR did and what was done
11 through his association and participation in the conspiracy,
12 there is jurisdiction over him personally for all of the
13 reasons that we've laid out in our papers.

14 With respect to the other arguments by other counsel,
15 we'll rest on our papers on those points, as I don't think
16 they've done anything other than reiterate what they've said in
17 our papers and we'll stand on ours.

18 MR. FILARDO: If I can briefly be heard on rebuttal.

19 First, jurisdictional discovery was conducted under
20 the Federal Rules of Civil Procedure pursuant to Judge Peck's
21 order. There was a period of jurisdictional discovery that was
22 set forth both for documents and anything that plaintiff needed
23 to take. They issued 26 document requests. That was what they
24 issued. They issued them broadly on general jurisdiction, on
25 specific jurisdiction, and the activities and connections of

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1 BSGR and Mr. Steinmetz with any agents alleged in the
2 complaint. They got all that, nothing came up. Nothing came
3 up to support the allegations with respect to an agency
4 relationship between my clients and Mr. Cilins.

5 In any event, Mr. Cilins' activities took place in
6 Florida. There is no allegation that under CPLR 302(a)(3) that
7 those out-of-state alleged tortious activities had a harmful
8 effect in New York. Therefore, they do not fulfill the
9 requirements for the long arm. Mr. Cilins was arrested in
10 Florida. He was incarcerated in Florida. He was moved to this
11 district for sentencing and for other investigative purposes
12 that are unclear.

13 But the acts that are alleged in the complaint by
14 plaintiffs do not take place in New York in any respect, nor do
15 their claims arise out of those acts. In essence, those acts
16 were the cover-up. They claim this happened as a cover-up,
17 presumably to help affect their issues with respect to statute
18 of limitations.

19 Your Honor, I think with respect to, again, general
20 jurisdiction, there has been nothing. And, in fact, even Rio's
21 counsel had admitted there's no general jurisdiction claims
22 against BSGR or Mr. Steinmetz outside of the ownership of that
23 property, which now has been completely refuted.

24 And, frankly, again, with respect to, and I didn't
25 address, but I'll do it now, 1965(a), which is the so-called

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1 RICO jurisdiction, that does not confer an independent basis
2 for jurisdiction. What is required under that analysis is that
3 there are, again, minimum contacts, that the forum state's long
4 arm jurisdiction is satisfied. And once you have that, then
5 you can look to see if there is an agent in the district at the
6 time the complaint is filed. And the agent that now and in
7 their opposition papers Rio points to is Mr. Thiam, but
8 Mr. Thiam is not alleged to be an agent in the complaint. And
9 certainly there are no facts that are alleged in the complaint
10 that would create an inference of agency between Mr. Thiam and
11 BSGR and Mr. Steinmetz.

12 THE COURT: Okay. I think this has been very helpful.
13 I will try and get to an opinion as soon as I can, probably in
14 the next couple weeks for sure. Thank you very much. Good to
15 see you.

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